***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 76-1095

In The

## United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

*vs.*

FABIO CAPECE,

*Appellant.*

# REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-1095

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UNITED STATES OF AMERICA,

Appellee,

-against-

FABIO CAPECE,

Appellant.

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# REPLY BRIEF FOR APPELLANT

## PRELIMINARY STATEMENT

Appellant respectfully submits this brief in reply to the brief for the Government in opposition to the appeal of respondent from the judgment of conviction entered against him on the 21st day of November, 1975 in the United States District Court for the Southern District of New York (Pierce, J.), sentencing him to a term of three years incarceration and three years special parole.

## POINT ONE

THE HEARSAY ADMITTED AGAINST APPELLANT WAS NOT TESTIMONY CONCERNING "VERBAL ACTS," BUT DECLARATIONS BY A NON-CONSPIRATOR, MADE PRIOR TO THE FORMATION OF ANY ALLEGED CONSPIRACY, AND IN VIEW OF THE WEAKNESS OF THE GOVERNMENT'S CASE, THE JUDGMENT

OF CONVICTION SHOULD BE REVERSED.

Michaele Browne, the Government witness, was the only person testifying that incriminated appellant. Admittedly, he was the one who shipped the marijuana by railroad that was picked up by Meinecke at the Pennsylvania station, when the latter was arrested. It was the testimony of Browne that on September 1, 1972, appellant hired him to load the marijuana on the train for two hundred dollars and that he transported the marijuana to the station in a motor vehicle leased by Mary Capece, not appellant. Indeed, no one identified appellant as being present when the vehicle was either leased or unloaded. But for Browne's testimony that appellant masterminded the transportation, Browne, himself, would be the person on whom the sole blame for transportation would fall. Thus, the only evidence against appellant was that of Browne, seeking to shift the onus from himself, and, therefore, this court should be especially sensitive to any prejudicial error that might shift the evidentiary balance.

As pointed out, the testimony reflected that the alleged conspiracy to transport marijuana was hatched among appellant, Browne and Meinecke on the 1st day of September, 1972. The indictment charges it was hatched on that very same day, adding, however, Salina Scarangela to the scheme. The record, however, does not reflect any more involvement of Scarangela other than Browne, appellant, Mary Capece and Meinecke living at her house in California.

The first of the objectionable hearsay testimony came from Browne, who testified that prior to August of 1972, before any conspiracy had been hatched, Salina Scarangela and Roberta Dilts asked him if he would be interested in participating in a marijuana transaction with a friend who was coming to California for that purpose. This testimony was duly objected to as hearsay and inadmissible, in that it was not uttered by a conspirator in furtherance of a conspiracy, for the two fundamental reasons that the alleged conspiracy had not yet been formed and, moreover, the declarants were never shown to be coconspirators.

In its brief, the Government now suggests that such testimony was admissible as "verbal acts." The difficulty with this belated argument is that the trial court did not admit the testimony as "verbal acts," and, therefore, the jury was not properly instructed in respect thereto. More than that, the very authority cited by the Government refutes that such declarations were, in fact, "verbal acts." In United States v. D'Amato, 493 F. 2d 359 (2nd Cir. 1974), cited by the Government, the Court defined "verbal acts" as descriptive of "contemporaneous non-verbal conduct or its tenor," which type testimony did not show in the case at bar.

What the Government succeeded in accomplishing by admitting into evidence alleged declarations by Scarangela and Dilts, was to effectively make the two of them witnesses against appellant, without the former testifying at all and in flat contradiction to the latter's testimony as a

Government witness. It is difficult to conceive of a more prejudicial use of hearsay in a trial, where the evidentiary balance surely did not heavily tilt against appellant.

The Government cites United States v. Ruiz, 477 F.2d 918 (2nd Circ., 1973) to justify the admission into evidence of the document seized from William Meinecke that contained the name and telephone number of Mary Capece. However, in that case, the piece of paper seized by the Government from a co-conspirator contained the name and address of the defendant, not his wife, as in the case at bar. There was no evidence that Mary Capece was part of any conspiracy, or had any knowledge that marijuana was to be shipped by Browne. The purpose of the Government in introducing the document into evidence was both unfair and sinister. It was an invitation to the jury to speculate that because Meinecke had the name and telephone number of the wife of appellant, the jury should infer a close business liaison between appellant and Meinecke and further infer that such liaison was bonded by narcotic trade. Such use of hearsay is abusive and denied appellant any vestige of a fair trial.

The Government's argument that even if error were committed, it was harmless as undermined by the Government's concession that it intended to use hearsay declarations by Dilts and Scarangella against appellant, and thereby support the testimony of the alleged coconspirator, the only witness against appellant. To characterize such error as harmless, is to characterize any error as harmless. The Government obviously

solicited this hearsay since it was aware that the unsupported testimony of Browne, seeking to shift the blame from himself, was hardly likely to impress a jury.

## POINT TWO

### THE LIMITATION ON THE DEFENSE WENT BEYOND THE COURT'S EXERCISE OF DISCRETION TO LIMIT CHALLENGES TO CREDIBILITY.

It was the defense of appellant that he had no participation in the crime of Browne, but that the latter was proceeding on his own account. It was, therefore, exceedingly important for the defense to develop that he was in the regular business of trafficking in narcotics, not the "office boy" that the Government tried to make him out to be. Yet, when the defense attempted to prove that the reason Browne had not mentioned his meeting with Dilts in his prior testimony was to conceal his trafficking in narcotics with her, not because of his affection for her as he explained, the defense was stopped by the Court. In that way, the Government succeeded in depicting Browne as a "messenger boy" on the bottom of the trafficking ladder, instead of the sophisticated dealer that he was. Not only was the defense limited in its cross-examination of Browne on this issue, but of Roberta Dilts as well, who was ready to brand Browne as the sophisticated dealer he was.

The cases cited by the Government are inapposite. In each of them, the trial court exercised its discretion to limit a general credibility

challenge, where credibility had been exhaustively challenged.

## POINT THREE

THE SUMMATION OF THE GOVERNMENT WAS SO PREJUDICIAL, THAT IT CONSTITUTED PLAIN ERROR, AND, THEREFORE, SHOULD BE REVIEWED IN THE ABSENCE OF AN OBJECTION, PURSUANT TO THE AUTHORITY OF RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

In arguing that Browne had nothing to gain by lying, since he had already been sentenced to probation, the Government deliberately mislead the jury. Browne had given similar testimony at former proceedings. It was this prior testimony that earned him the sentence of probation. For him to change testimony at this trial, would run for him a risk of a perjury indictment. To urge the jury that Browne had no motive to testify as he did was to deliberately mislead them, and tilt the fact finding machinery in this otherwise weak prosecution. The same can be said for the overzealous representation to the jury that there was evidence, other than what came from Browne, against appellant, when, in truth, there was not. In none of the cases citedby the Government had the prosecutor gone as far as in the case at bar.

Rule 52 (b) of the Federal Rules of Criminal Procedure provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

See United States v. Indiviglio, 352 F.d 276 (2nd Circ., 1965). Even in the absence of an objection, the trial court should have intervened to protect the rights of appellant. In any event, the effort by the prosecution on summation to buoy its drowning case, was so prejudicial that it should be reviewed by this Court even in the absence of objection.

## CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA

Appellee

- against -

FABIO CAPECE

Appellant

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* New York *ss.:*

I, Victor Ortega, *being duly sworn,*
*depose and say that deponent is not a party to the action, is over 18 years of age and resides at*
1027 Avenue St. John, Bronx, New York
*That on the* 1st *day of* July *19*76 *at* 1 St. Andrews Pl. New York N.Y.

*deponent served the annexed* Reply Brief
*upon* XXX U.S. Attorney for the So Dist. of N.Y.

*the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

*Sworn to before me, this* 1st
*day of* July *19* 76

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0318950
Qualified in New York County
Commission Expires March 30, 1977